IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL APPEAL NO.74/2000

Basawraj Tukaram Isran,
s/o late Chikanna,
r/o 3533, 6th Cross,
Gayatri Nagar,
Bangalore 21, presently
lodged in Central Jail,
Aguada, Goa. ... Appellant

Versus

STATE OF GOA ... Respondent.

Shri P. P. Singh, Advocate for the appellant.

Shri A.P. Lawande, Public Prosecutor for the State.

CORAM: A.S. AGUIAR &
P.V. HARDAS, JJ.

DATE: 12th February, 2002.

ORAL JUDGMENT (Per Aguiar, J.)

Under challenge in this Appeal, is the Judgment and Order dated 30th August, 2000, passed by the learned Additional Sessions Judge, Panaji, convicting the accused/appellant herein for an offence punishable under Section 302 of the Indian Penal Code, sentencing him to undergo imprisonment for life. The learned Additional Sessions Judge has based his order of conviction purely on circumstantial evidence, holding that the death in this case was homicidal and caused by the accused/appellant herein.

2. Briefly, the case of the prosecution is that on 13th February, 1999, the accused and his friend the deceased, Jagdish @ Jagga Erappa came together from

Bangalore to Goa and stayed at Hotel Bareton, Panaji. From there they went sight-seeing together. At Calangute beach, they met one Naguesh Sanjeevaiah and Senthil Kumar Suttuswamy and they all returned to the Hotel at about 6.15 p.m.. Thereafter, all four went on a nocturnal sight-seeing trip and returned to Hotel Deluxe where Naguesh and Senthil were staying. At the Hotel, they had alcoholic drinks. However, since the deceased Jagdish and the accused being inebriated, started making a nuisance of themselves and started quarrelling with each other and also abusing each other in a loud tone, the Manager of Deluxe Hotel asked them to leave the Hotel. After they left the Hotel and while proceeding on the 31st January Road, the accused threw a solidified cement stone on Jagdish, resulting in his death. Charges were framed against the accused for intentionally causing the death of Jagdish with the said solidified cement stone under Section 302 I.P.C..

3. The accused however, pleaded not guilty. The prosecution to prove its case, which it must be again stated, was based purely on circumstantial evidence, has examined in all 24 witnesses. The material witnesses are P.W.7, Amesh Pagi, a receptionist at Hotel Bareton, where the deceased and the accused were staying, P.W.8, Inacio Tomas Menezes, bell-boy of the Hotel Bareton, who took the accused and the deceased to room no.104, P.W.10,

Agostinho Oliveira, who took the accused and the deceased to Hotel Bareton, P.W.11, Bharat Bagwant Naik, Manager of Hotel Deluxe, wherein Naguesh and Senthil were staying and were having drinks in room no.7, alongwith accused and deceased. P.W.17, Carlos Evaristo Fernandes, a tourist guide, who took the accused and the deceased Jagdish alongwith Naguesh and Senthil on the nocturnal tour, and P.W.23 Naguesh Sanjeev Bahiya, who was staying in Room no.7 in Hotel Deluxe and who had accompanied the deceased and the accused on the night tour and in whose hotel room all the four persons i.e. deceased, accused, Naguesh and Senthil, had drinks. It must be here noted that Senthil has not been examined. The evidence of the aforesaid witnesses is material for the purpose of proving the circumstance of the accused being last seen together with the deceased.

4. Learned Public Prosecutor, Shri Lawande, has set out four circumstances, which, according to him, clinchingly prove that the deceased was murdered by the accused. The said circumstances are as follows:-

> "(1) In this case, both the accused and the deceased came together from Bangalore and stayed together in a room in the Hotel Bareton, they thereafter left the Hotel together for sight-seeing, where they met the two others, namely Naguesh and Senthil. Thereafter all four of them returned to Hotel Deluxe where Naguesh was staying alongwith his friend Senthil and where they had drinks. It was in the said

Hotel Deluxe in Room no.7 that the accused and deceased were seen quarrelling and made such a nuisance of themselves that the Hotel Manager had to ask them to leave the Hotel. It is contended that although they were all the time together, right from the time they left Bangalore and came to Goa till they were asked to leave the hotel Deluxe, the accused and the deceased were together. Yet, surprisingly, the accused on the night 13th/14th February, 1999,did not come back to the Hotel Bareton where he and the deceased had checked in, but, in fact, left the Hotel without checking out of the Hotel and had in fact left Goa and returned to Bangalore, from where he was picked up by the Police three days after the incident. It is pointed out that no explanation whatsoever is forthcoming from the accused as to why he suddenly left Goa and went to Bangalore, without checking out from the Hotel.

(2) The evidence of the witnesses who have deposed that both the accused and the deceased were seen fighting together in the room no.7 of the Deluxe Hotel and were asked to leave on account of their bad behaviour and that both were heavily drunk.

(3) Recovery of the jacket of the deceased and the clothes of the accused, which according to the prosecution is proved by the panch witness P.W. 4. Sebastian Quadros in the recovery panchanama P.W.4/A when the accused realized that Jagdish was wearing his jacket he removed the jacket from the body of Jagdish and went to the salt pan where he hid the jacket and the clothes of the accused.

(4) Medical evidence, which according to the prosecution proves that the death was homicidal.

5. Dealing with the last circumstance first, namely that death was homicidal, reliance has been placed on the evidence of Dr. Sapeco. However, from the

impugned Order there appears to be no finding given by the learned Additional Sessions Judge that the death was homicidal. It seems that merely on the basis of the inquest panchanama and the injuries on the dead body, the recovery of the jacket and clothes of the deceased at the instance of the accused under panchanama and the circumstance that the deceased was last seen together with the accused, the trial Judge has concluded that it was a case of murder by the accused. It is well-settled that before arriving at a finding of guilt, it is necessary to first establish whether death was homicidal, accidental or suicidal. No doubt there were serious injuries which have resulted in the death of the deceased, but whether these injuries were caused as a result of an attack on the deceased or on account of the deceased falling on the stones and the large stone rolling on to his head, or whether the deceased himself got crushed under the weight of the large stone, which he was attempting to carry, as suggested by the defence, has not been established. Reliance has been placed upon the evidence of Dr. Silvano Sapeco, P.W.22. who had performed the post-mortem examination on the body of the deceased. Dr. Sapeco has stated that the said injuries which were ante-mortem injuries are as below:-

1. Oblique contused lacerated wound with dry blood around of 3 x 1/4 x 1/2 cm on left side of forehead.

2. Red bruise with abrasion of 2 cms. diameter at nasivion (bridge of nose).

3. Red bruise with abrasion 3 x 2 cms. on the left cheek.

4. Red bruise with abrasion 4 x 2 cms. on right temple.

5. Red bruise with abrasion of 7 x 3 cms. on left chest front at front axilla.

12. Pressure abrasions with palpation of crepitus of fractured skull bones at head in an area of 30 x 20 cms. was seen on right side of head, face, neck and upper chest.

According to Dr. Sapeco, the aforesaid injuries at sr. nos. 1 to 5 and 12 were caused by blunt force impact by object or surface. The other injuries are:-

6. Grazed abrasion 6 x 1/4 cms. on right porenated aspect of forearm.

7. Grazed abrasion 8 x 4 cms. on left shoulder blade region.

8. Grazed abrasion 4 x 2 cms. on lumbar region at lower back.

9. Grazed abrasion 4 x 2 cms. on right iliac crest.

10. Grazed abrasion 2 x 1 cms. on right knee cap.

11. Grazed abrasion 2 x 1 cms. on left knee cap.

According to Dr. Sapeco, the aforesaid injuries no.6 to 11 were caused by friction on hard rough surface. Dr. Sapeco has opined that in this case "death was due to crushing damage of head and brain as a result of blunt force impact by object or surface, which was necessarily fatal, ante-mortem and fresh at the time of death." Dr.

Sapeco has further opined that M.O.1, (large stone), could have caused injuries no 1 to 5 and 12 and other injuries no.6 to 11 could have been caused due to friction by hard and rough surface like M.O.2, (the smaller stone. However, it is clear that death was the result of injury no.12. In his cross-examination Dr. Sapeco has admitted that from the post-mortem examination he could not make out what was the actual weapon used, that from the smell of alcohol and contents of the stomach there is a possibility that the deceased was under the influence of alcohol. To a suggestion put to him in cross-examination, Dr. Sapeco admits that it is possible that if a person under intoxication lifts a stone and looses balance and in that process the stone falls on him, such injuries could be caused and thus result in death. From the photographs taken at the site where the dead body of the deceased was found, it is seen that there is a large stone about 25 to 30 kgs. in weight, which is resting on the right side of the face and shoulder of the deceased. Another smaller flat stone which appears to be a part of the pavement stone has large blood stains on it. Clearly the large stone was not thrown on the head of the deceased or else the head would have been crushed. However, it seems probable that the stone was only placed on the head of the deceased after he had fallen down and was lying unconscious or dead on the pavement. The smaller flat stone with blood

stains on it suggests that the deceased could have fallen on the flat stone causing bleeding injuries and resulting in blood falling onto the flat stone. Looking at the size and weight of the larger stone, M.O.1, i.e. 25 to 30 kgs. it is ridiculous to suggest that the same could have been picked and thrown at the deceased by any person of normal build, much less by the accused, who admittedly was also drunk. Moreover the injuries on the head of the deceased do not suggest that the said stone was thrown. Undoubtedly, the said stone has been placed for some inexplicable reason by some person on the head and shoulder of the deceased after he lay unconscious or dead, on the pavement. The suggestion that the said stone rolled on to the head of the deceased after the deceased had fallen on the pavement seems improbable, but cannot be ruled out. From the photographs, Exh.P.W.14/A (colly.), it seems probable that the deceased could have fallen on the pavement and hurt himself by impact with the rough surface, more particularly the smaller flat stone which has blood stains on it, as the deceased was in a highly intoxicated state. It is also possible that the injury stated in the post-mortem report, namely injury no.12 could have been caused by some other hard and blunt substance and not M.O.1, the large stone. Dr. Sapeco has admitted that he is not able to tell the nature of the actual weapon used. Thus, from the nature of the injuries and the position of the body found at the

site with blood stains on the stones on the pavement, it cannot be ruled out that the deceased could have fallen and suffered the abrasions and other injuries, but it seems improbable that injury No.12 could have been caused by the deceased merely falling on the pavement. It is probable that the death could have been accidental due to repeated fall of the deceased on the pavement on account of his intoxicated condition, or that injury No.12 could have been caused by M.O.1 (large stone) rolling on to the head and shoulder of the deceased after he had fallen on the pavement, or that the accused was attacked by some person with some hard, blunt object. Thus, the prosecution has failed to establish conclusively that the death in this case was homicidal. It is pertinent to note that no weapon was recovered at the instance of the accused.

6. Coming to the circumstance of the deceased and the accused last being seen together, there is no doubt that the prosecution has established beyond doubt that the accused was last seen with the deceased. It is established that the accused and the deceased both left Bangalore and came to Goa together, they checked in at Hotel Bereton, went out together for sight-seeing and met the other two persons, i.e. Naguesh and Senthil,they again all went on a nocturnal trip and they came to room no.7 at Hotel Deluxe, where they all had drinks, that the

accused and the deceased were quarrelling during their sight-seeing tour and also in the hotel, till they were asked to leave the Hotel by the Manager and upon the accused and the deceased leaving the Hotel, the Hotel Manager closed the gate. By bringing on record evidence of the witnesses upto the stage of shutting of the gate, the prosecution has effectively shut out all further evidence that could have been available as to the subsequent events that took place after the deceased and accused left the Hotel Deluxe. There is a complete blank as to what happened after the accused and the deceased left the Hotel on the midnight of 13th/14th February, 1999 till the body of the deceased was found the next day at about 7.30 a.m. on the pavement of the 31st January road oustide the Hotel Deluxe.

7. The prosecution has made no attempt to find out what happened after the accused and the deceased left the Hotel Deluxe on the midnight of 13th/14th February. The evidence shows that the deceased and accused were last seen together in the room of the two other companions, namely Naguesh P.W.23 and Senthil, till they left the Hotel. Naguesh, P.W.23, has stated in his evidence that after the deceased Jagdish and the accused went out of the Hotel Deluxe, they had their food and then went to sleep. Naguesh however, does not state that the Manager closed the Hotel door after the accused and

the deceased had left the Hotel. We also find that the other person, namely Senthil, who was also in the room with the accused and the deceased and Naguesh has not been examined. The only evidence that the door was closed after the accused and the deceased left is that of the Manager of Hotel Deluxe, P.W.11, Bharat Bagwant Naik and P.W.12, Ramesh Naik. P.W.11 has stated that after the accused and deceased left the Hotel, he locked the gate of the Hotel and P.W.12, Ramesh Naik, who worked as a clerk in the Konkan Tours and Travels, Panjim, has also stated after the two had left, the gates were closed and thereafter they went to sleep. Thus, there is no evidence forthcoming as to what happened after the deceased and the accused left the Hotel Deluxe. In the first place, it has not been established that the two left together or whether one left after the other, or whether there was a time gap between the two of them leaving the Hotel Deluxe. The behaviour of Naguesh and Senthil, whom the accused and the deceased had befriended that very evening when they met at Calangute beach and with whom they were having drinks in the hotel room occupied by Naguesh and Senthil, seems unnatural. Since both the accused and the deceased were allegedly inebriated and were asked to leave the room immediately, it is to be expected that Naguesh and Senthil would have at least asked them to have food before going. Naguesh states that he and Senthil had their food immediately

after the two had left. What could have compelled the two to leave immediately after the Manager told them to leave? Surely Naguesh and Senthil could have requested the Manager to allow the two to at least have food before they left. Furthermore, even after they left, it was only natural that Naguesh and Senthil would have anxiously followed them, at least so far as the eye could see. It is not on record that after the gates of the Hotel Deluxe were closed the road which the accused and deceased are alleged to have taken, could not be seen from the Hotel Deluxe. The examination of these two witnesses, who admittedly were together with the accused and deceased, on this aspect, was of vital importance to the prosecution case. The prosecution ought to have also examined Senthil, whose evidence has not come on record as to what was the circumstance that brought these two persons together with the accused and the deceased and what was the subject of the quarrel between the accused and the deceased, which has been referred to by the witnesses. It is on record that the accused and the deceased were quarrelling, but obviously they were quarrelling because of their inebriated condition. Was the quarrel about something so serious that the accused should have murdered the deceased? These two persons Naguesh and Senthil could have thrown light on the subject of the quarrel between the accused and the deceased, thereby leading to the motive, if any, for the

murder. No doubt it is not necessary to prove motive in case of murder, but when the evidence is purely circumstantial, motive becomes absolutely material. In this case the prosecution has not been able to bring on record any motive that could have incited the accused to have committed the murder of the deceased.

8. No doubt the defence has not brought on record anything adverse to the prosecution case in the cross-examination of Naguesh. Be that as it may, the weakness of the defence cannot be the strength of the prosecution. The prosecution must establish its case to the hilt and where the offence is a serious one such as murder, the burden of proof required is of the highest standard and the accused must be given the benefit of doubt. In the present case, the prosecution has only proved that the accused and the deceased were seen together, till they left the Hotel, but that is not necessarily the last time they were seen together. The circumstance of the accused failing to explain why he left Goa on the midnight of 13th/14th February, without checking out of the Hotel Bareton, where he was staying and returning to Bangalore alone, without caring to find out the whereabouts of his friend, is no doubt a serious circumstance which arouses suspicion about the part played by the accused in the death of the deceased. However, suspicion by itself, however strong, cannot be a

substitute for evidence and it is for the prosecution to establish its case to the hilt beyond a shadow of doubt, especially in the case of a serious crime like murder, where the accused, on conviction, is required to undergo life imprisonment, if not death. It is well-settled that the prosecution must stand on its own feet and cannot rely upon the weakness of the defence. The prosecution has failed to bring on record vital evidence which would have been available if the Police had taken the trouble of carrying out a thorough investigation. It is the case of the prosecution that the 31st January road outside the Hotel Deluxe was completely isolated and no persons are living nearby. It is not the prosecution case that the street was in absolute darkness and therefore nobody could have seen the accused and the deceased on the said road after they left the Hotel, if they were quarrelling. It is difficult to believe that nobody saw the body lying on the footpath of the 31st January road till next morning and it was a press reporter, who on receipt of an anonymous call regarding the dead body lying on the pavement, informed the Police of the same and that the Police visited the site only thereafter. There are several gaps in the prosecution case which remain unexplained and, therefore, uninvestigated. It cannot be said from the evidence that has been brought on record, that the prosecution has proved beyond a shadow of doubt that the accused and the

accused only caused the death of his friend the deceased. Even the circumstance of the accused being last seen together with the deceased cannot be said to be proved beyond a shadow of doubt and therefore, cannot be a circumstance sufficient enough to record a finding that it is consistent with the hypothesis of the guilt of the accused (**Arjun Marik & Ors. vs. State of Bihar,** 1994 Supp.(2) SCC 372).

9. The Apex Court per Fazal Ali, J. in **Sharad Birdhichand Sarda** vs. **State of Maharashtra,** reported in (1984) 4 SCC 116, has laid down five conditions that must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence, as follows :-

"(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the

accused."

10. We do not propose to deal in detail with the circumstance pertaining to the recovery of the jacket of the accused and the clothes of the deceased, suffice it to say that it cannot, by any stretch of imagination be said to be proved. The learned trial Judge has blindly accepted that evidence of Panch witness, P.W.4 (Sebastian Quadros), without any discussion about the value and admissibility of the evidence. P.W.4 has deposed to the confessional statement of the accused recorded by him in his own handwriting in Kannada and the same was allegedly translated to the Pancha. The entire portion of the first part of the Panchanama recorded under Section 27 of the Evidence Act repeating the confessional statement of the accused in inadmissible in evidence. Further, the jacket of the accused and clothes of the deceased are alleged to have been recovered by the Police at the instance of the accused, and the accused himself allegedly took out the jacket which was partly submerged in water under a tree and the clothes of the accused, that were under a stone in the bushes and handed them to the Police. The entire sequence of events as allegedly related to by the accused, that is, after the accused allegedly murdered the deceased, leading to the concealment of the jacket and clothes of the accused amd the recovery of the said clothes under Panchanama, seem highly improbable. No sane man would do what the accused is alleged to have done.

11. The circumstances, namely of the accused being last seen with the deceased and his failure to give any explanation as to why he left Goa on the night of 13th/14th February, 1999, without the deceased and returned to Bangalore, though raising a strong suspicion, do not by themselves prove the guilt of the accused. Clearly there are gaps in the prosecution case. The investigation has been carried out perfunctorily, without any real attempt to unearth the truth. It cannot be said that there are any circumstances implicating the accused established, leave alone a chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and showing that in all human probability, the act must have been done by the accused.

12. In the light of the above discussion, the conviction of the accused under Section 302 of the Indian Penal Code will have to be set aside. Hence, we pass the following Order:-

The Appeal is allowed. The Judgment and Order dated 30th August, 2000, passed by the Additional Sessions Judge, Panaji, in Sessions Case No.20/99 is set aside and the appellant-accused is acquitted of the charge under Section 302 of the Indian Penal Code. Appellant to be set at liberty, forthwith, if not

required in any other offence.

A. S. AGUIAR, J.

P. V. HARDAS, J.